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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/635,898	08/07/2003	Chantal Amalric	03129CIP	7792

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EXAMINER	
LAMM, MARINA	

ART UNIT	PAPER NUMBER
1617	

DATE MAILED: 08/25/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/635,898	AMALRIC ET AL.	
	Examiner	Art Unit	
	Marina Lamm	1617	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE ____ MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *07 June 2006*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *19-35 and 37-39* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *19-35 and 37-39* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Acknowledgment is made of the amendment and Declaration filed 6/7/06. Claims pending are 19-35 and 37-39. Claims 19 and 29 have been amended. Claim 40 has been cancelled.

Claim Rejections - 35 USC § 103

1. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

2. Claims 19-21, 24-35 and 37-39 are rejected under 35 U.S.C. 103(a) as being unpatentable over Briggs et al. (WO 96/04894) in view of Nadaud et al. (US 5,798,108), both of record.

Briggs et al. teach multiple cosmetic emulsions, containing an oily outer phase and two or more aqueous inner phases, wherein one of these aqueous phases can be in the form of a gel, containing gelling agent such as xanthan gum. See p. 7, second paragraph; p. 14, last paragraph; p. 15; Examples III and IV. The 1% aqueous solution of the gelling agent has a viscosity of at least about 4000 mPa.s. See p. 14. The emulsions of Briggs et al. contain emulsifiers such as dimethicone copolyol and/or laureth-7. See Examples; p. 16, second paragraph. The suitable outer phase oils of Briggs et al. include silicone oils, waxes, dicaprylate/dicaprate, isopropyl palmitate, etc and are present at the claimed concentrations. See p. 7; pp. 15-16; Examples. Briggs et al. teach preparing the emulsions by first preparing water and oil emulsion and then adding to the emulsions a gel phase. See Examples III and IV. The compositions of

Briggs et al. may contain 1-12% of sunscreens, such as titanium dioxide, zinc oxide and/or organic sunscreen. See pp. 12, 16; Example IV. The compositions of Briggs et al. also contain mineral fillers such as talc. See Example IV. The Briggs et al. reference does not explicitly teach the claimed gelling agents. However, Nadaud et al. teach using methacrylates or xanthan gums for gelling aqueous phase in cosmetic triple emulsion. See col. 2, line 61 – col. 3, line 6. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the compositions of Briggs et al. such that to use methacrylate polymeric gelling agents instead of xanthan gum gelling agent. One having ordinary skill in the art would have a reasonable expectation of obtaining the same gelling effect as set forth in the Briggs et al. reference because these gelling agents are used interchangeably for the same art-recognized purpose as suggested by Nadaud et al. Selection of a known material based on its suitability for its intended use is obvious absent a clear showing of unexpected results attributable to the applicant's specific selection. See e.g., *In re Leshin*, 227 F.2d 197, 125 USPQ 416 (CCPA 1960). Further, Briggs et al. does not explicitly teach the claimed viscosity of the gel phase. However, the determination of optimal or workable viscosity of the gel phase by routine experimentation is obvious absent showing of criticality of the claimed viscosity. One having ordinary skill in the art would have been motivated to do this to obtain the desired stability and/or aesthetic properties of the formulation. With respect to Claim 27, the reference does not explicitly teach the claimed concentration of the gelling agent. However, the reference teaches that gelling

agents can be present at a level preferably from about 0.01% to about 10%, more preferably from about 0.02% to about 2%, and especially from about 0.02% to about 0.5%. See p. 14, the last paragraph; p. 15, first two paragraphs. Further, Briggs et al. exemplifies 0.08% of xanthan gum. See Example IV. Therefore, the determination of optimal or workable concentration of the gelling agent by routine experimentation within the reference's generic disclosure is obvious absent showing of criticality of the claimed concentration. One having ordinary skill in the art would have been motivated to do this to obtain the desired stability of the formulation. With respect to Claims 30 and 31, the reference does not explicitly teach the claimed ratio of the primary emulsion to the aqueous gel. However, the determination of optimal or workable ratio of the primary emulsion to the gel phase by routine experimentation is obvious absent showing of criticality of the claimed ratio. One having ordinary skill in the art would have been motivated to do this to obtain the desired moisturizing properties of the composition. With respect to Claim 32, the reference does not explicitly teach introducing the primary emulsion into the aqueous gel. However, there appears to be no criticality associated with the claimed order of mixing the ingredients because the prior art achieves the same results (i.e. preparing a dispersion in which the aqueous gel is dispersed in the water-in-oil emulsion) as claimed herein. Therefore, in the absence of some evidence of unexpected results due solely to the mixing ingredients in the specific order, it would have been obvious to one having ordinary skill in the art at the time of the invention to mix the primary emulsion and the gel in any order, because the

prior art derives the same result as discussed above. With respect to Claims 34 and 35, Briggs et al. does not explicitly teach gelling an aqueous phase with a polymer and then mixing the aqueous gel with a primary w/o emulsion. However, Briggs et al. teach that their emulsions may contain a hydrophilic gelling agent in an aqueous solution. See p. 14, last paragraph. Further, Briggs et al. teach a mixture of propylene glycol and xanthan gum. See Example IV. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the compositions of Briggs et al. such that to use water instead of or in addition to propylene glycol in Example IV. One having ordinary skill in the art would have been motivated to do so because Briggs et al. teach gelling an aqueous solution with hydrophilic gelling agents as discussed above.

3. Claims 22 and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Briggs et al. (WO 96/04894) in view of Nadaud et al. (US 5,798,108) and further in view of either Ansmann et al. (US 5,840,943) or Milius et al. (WO 00/56438 as translated by US 6,488,946), all of record.

Briggs et al. in view of Nadaud et al. applied as above. The references do not explicitly teach the claimed emulsifiers. However, Ansmann et al. teach making stable emulsions using polyglycerol polyhydroxystearate emulsifiers in combination with other conventional w/o emulsifiers, including polyglycosides. See Abstract; col. 5, lines 5-13, 66-67; col. 6, lines 1-2. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the emulsions of Briggs et

al. such that to employ the emulsifiers of Ansmann et al. One having ordinary skill in the art would have been motivated to do this to obtain improved stability as suggested by Ansmann et al. The selection of a known material based on its suitability for its intended use is obvious absent a clear showing of unexpected results attributable to the applicant's specific selection. See e.g., *In re Leshin*, 227 F.2d 197, 125 USPQ 416 (CCPA 1960). Alternatively, Milius et al. teach using polyglycoside emulsifiers for making stable w/o emulsions. See Abstract. The emulsifiers of Milius et al. can be employed in combination with co-emulsifiers such as polyglycol polyhydroxystearates and silicone emulsifiers. See col. 4, lines 45-51. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the emulsions of Briggs et al. such that to employ the emulsifiers of Milius et al. One having ordinary skill in the art would have been motivated to do this to obtain improved stability as suggested by Milius et al.

Response to Declaration

4. The Declaration under 37 CFR 1.132 filed 6/7/06 is insufficient to overcome the rejection of claim 40 based upon Briggs et al. in view of Nadaud et al. as set forth in the last Office action because: the Declaration is not commensurate in scope with the instant claims. Thus, the Declaration emphasizes that the polymers recited in Claim 40 (and now in Claims 19 and 29, as amended) allow formation of water-in-oil emulsions (not oil-in-water emulsions) which are "stable over time despite the use of minimal amounts of (external) oil phase". See p. 2 of the Declaration. "The chosen group of

polymers do therefore provide 'unexpected results,' going beyond the simple thickening role which could have been expected of them from the prior art: namely they stabilize particular types of emulsion in which the oil phase remains the external phase (within which aqueous droplets are dispersed) despite constituting less than 20% (even as little as 10%) of the overall emulsion." See p. 3 of the Declaration. However, the independent Claims 19 and 29 do not recite "minimal amounts of the oil phase" and Claim 20 recites as much as 50% of the oily outer phase, which cannot be considered a "minimal amount". The instant claims encompass W/O compositions containing such amounts of the oily phase, wherein the formation of a stable W/O emulsion would present any problems. Therefore, the unexpected results demonstrated in the instant Declaration are limited to those emulsions containing 10-15% by weight of the emulsion of the oily phase. The Applicant has not demonstrated the unexpected results over the entire concentration range of the oily phase encompassed by the instant claims. Therefore, the Declaration is not commensurate in scope with the instant claims.

Response to Arguments

5. Applicant's arguments filed 6/7/06 have been fully considered but they are not persuasive.

The Declaration has been addressed above. In addition, the Applicant argues:

> "Although Nadaud et al does mention polymers within the group preferred, Nadaud et al does not teach or suggest this effect [stabilizing water-in-oil emulsions of the instant invention]. On the contrary, Nadaud et al is specifically directed to water/oil/water triple emulsions with a gelled continuous external aqueous phase. According to the invention, it is the oil phase that is the external phase, and in the cosmetics field, this result is quite distinct in terms of the effect

> on the skin of the wearer as well as in terms of water resistance and stability towards oxidation in air. A document teaching the use of gelling agents for emulsions with an aqueous external phase does not suggest their use to a cosmetic specialist for emulsions with an oily external phase, and the Nadaud et al reference does not teach or suggest the specific effects which have been observed at low oil levels in an oily external phase emulsion." See p. 7 of the reply.

In response, Nadaud et al. teach using methacrylates or xanthan gums for gelling aqueous phase in cosmetic emulsion as discussed above. Therefore, one having ordinary skill in the art at the time the invention would reasonably expect that methacrylate polymeric gelling agents could be used instead of xanthan gum gelling agent for gelling aqueous phase in cosmetic emulsions regardless of their specific types. One having ordinary skill in the art would have a reasonable expectation of obtaining the same gelling effect as set forth in the Briggs et al. reference because these gelling agents are used interchangeably for the same art-recognized purpose as suggested by Nadaud et al.

Conclusion

6. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not

mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Marina Lamm whose telephone number is (571) 272-0618. The examiner can normally be reached on Mon-Fri from 11am to 7pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreenivasan Padmanabhan, can be reached at (571) 272-0629.

The fax phone number for the organization where this application or proceeding is assigned is (571) 273-8300. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Marina Lamm, M.S., J.D.
Patent Examiner
8/13/06

SREENI PADMANABHAN
SUPERVISORY PATENT EXAMINER